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No. 93-1128

In the Supreme Court of the United States

OCTOBER TERM, 1993

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
PETITIONER

v.

FRED P. GARDNER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Several points raised in respondent's opposition to our petition for certiorari call for a brief reply.

1. Respondent's assertion (Br. in Opp. 11) that the Secretary imposes a fault requirement on only one out of four categories of claims under Section 1151 is incorrect. The phrase "approved medical or surgical care properly administered" in 38 C.F.R. 3.358(c)(3) encompasses cases arising out of hospitalization or medical examination as well as those arising out of medical or surgical treatment *per se*, and the Secretary has interpreted and applied the statute and the

regulation to require a showing of fault or accident in such cases.[1]

2. The parallel that respondent attempts to draw (Br. in Opp. 12-15) between compensation for service-connected and non-service-connected disabilities is flawed. The basic premise of compensation for service-connected disabilities under 38 U.S.C. 1110 and 1131 (Supp. IV 1992) is that the government will assume responsibility for conditions contracted by service members "in the line of duty." In defining what constitutes the "line of duty," Congress has generally required only a temporal relationship between the service member's duty status and the onset of the condition. See 38 U.S.C. 105 (1988 & Supp. IV 1992). Section 1151, by contrast, provides for the payment of compensation for certain disabilities *as though* they arose from service-connected conditions. That compensation is not based on a general assumption of responsibility by the government toward those who take up arms on its behalf; rather, it is based on specific causal connections between the disability in question and treatment rendered by the Veterans Administration with respect to some condition that had nothing to do with the veteran's military service. It would be quite odd to treat these two situations alike. Congress could, instead, quite rationally have intended to require some showing of

[1] See, *e.g.*, *Cariaga* v. *Brown*, 5 Vet. App. 397 (1993) (death during hospitalization); VA Admin. Dec. 944 (July 26, 1954); VA Admin. Dec. 992 (Dec. 14, 1970); 2 Op. Sol. VA 260 (1931) (injury during travel to examination not covered because no VA fault involved); compare 38 C.F.R. 3.358(c)(4) (injury during transportation associated with hospitalization); 38 C.F.R. 3.358(c)(7) (special provisions for nursing home care).

causation and fault before assuming full governmental responsibility for disabilities arising from the treatment of non-service-connected conditions.[2]

2. In response to our argument based on long congressional acquiescence in the Secretary's interpretation of Section 1151, respondent quotes at length (Br. in Opp. 25-26) from a General Counsel opinion of March 8, 1984. That opinion—which we have reprinted for the Court's convenience as an appendix to this brief—deals with a case in which a veteran claiming compensable injury under Section 1151 was treated, not at a facility operated by the Department of Veterans Affairs (VA), but at a military hospital operated by the Department of Defense (DOD). The General Counsel rejected as "overly restrictive" any reading of 38 C.F.R. 3.358(c)(3) that would have precluded liability because the treatment was rendered in a DOD, rather than a VA, hospital. Rather

[2] Respondent contends (Br. in Opp. 15, emphasis omitted) that petitioner's "own General Counsel [has] stated that Congress did not intend there to be a distinction between recipients" of benefits under Sections 1110, 1131 and 1151. But respondent cites General Counsel Opinion 80-90 completely out of context. That opinion dealt with the question whether survivors of a veteran who had been receiving benefits under Section 1151 before his death were entitled to receive death benefits under what is now 38 U.S.C. 1318 (Supp. IV 1992), which provides death benefits under certain circumstances where at the time of death the veteran was entitled to compensation "for a service-connected disability." Op. VA Gen. Coun. 80-90 (1990). The General Counsel concluded (*id.* at 3) that once a veteran is awarded benefits under Section 1151, Congress intended that his disability should be treated as "service-connected" for purposes of Section 1318 as well. That conclusion is irrelevant to the question at issue in this case.

than supporting respondent's position, the opinion accepts as a premise that Section 1151 requires some governmental fault as a predicate for the award of benefits. App., *infra*, 2a, 5a.

Conversely, respondent fails in his attempt (Br. in Opp. 21-22) to distinguish the two early administrative decisions (*Concannon* and *McKeown*, cited at page 14 of the petition) that demonstrate that the VA applied a fault requirement under the predecessor to Section 1151 before repeal and reenactment of the provision in the early 1930's. The opinion on the Concannon claim, 65 Op. VA Gen. Coun. 429 (1930), determined that the veteran's emergency dental treatment had been properly authorized, so that he would be eligible for *consideration* for compensation under Section 1151 (then Section 213) if he met the other requirements of that Section. 65 Op. VA Gen. Coun. at 431. The opinion states unequivocally that those other requirements include a showing that "the disability causing the death proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, etc., in furnishing the treatment, as distinguished from the usual after results of approved medical care and treatment properly administered." *Ibid.* Similarly, the opinion on the McKeown claim, 50 Op. VA Gen. Coun. 439 (1928), rests on the conclusion that "[i]t is apparent from the facts in this case that this veteran, by reason of his hospitalization, was unnecessarily placed in a position of peculiar danger and allowed to remain there, evidently through the *fault* of authorities in charge of the hospital." *Id.* at 440 (emphasis added).

Finally, respondent suggests (Br. in Opp. 22 n.9) that the 1930 opinion of the Comptroller General cited in the petition (at 14) indicates that a veteran who developed dermatitis as the result of x-rays was accorded benefits without a showing of fault. The opinion in question concludes that the VA was not required to discontinue compensation previously awarded to a veteran when it later determined that the veteran's original VA hospitalization—out of which the dermatitis arose—should not have been authorized. See 9 Comp. Gen. 515, 516-517 (1930). The opinion explicitly notes that "[t]he plain intent of [what is now Section 1151] * * * was to afford veterans some measure of compensation in those cases in which the disability arises through accident, carelessness, negligence, lack of proper skill, error in judgment, etc." 9 Comp. Gen. at 516. The opinion thus makes perfectly clear that the applicable legal standard required some showing of fault.[3]

4. There is no question that the Court of Appeals for the Federal Circuit can and should subject the Secretary's regulations to thorough review. See Br. in Opp. 30-33. There should also, however, be no question that such review must be subject to the

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[3] Respondent also points to the fact that there have been changes over the years in the details of the VA's implementation of the causation requirements under Section 1151, particularly with respect to compensation in cases involving "accident" rather than fault. See Br. in Opp. 28-30. The details of the Secretary's interpretation of the fault and accident requirements are not, however, at issue in this case. The question is whether the Secretary has permissibly construed Section 1151 to impose *some* requirement of fault or "accident."

same principles of deference to reasonable and long-standing administrative interpretations that guide and limit judicial review of the regulations of all other administrative agencies. See Pet. 19-20. Indeed, observance of those principles is particularly necessary in the case of the VA. Because the Federal Circuit has exclusive jurisdiction to review challenges to the Secretary's regulations, a single lower court decision like the one in this case can, without this Court's review, sweep aside 60 years of administrative precedent and practice, direct the payment of hundreds of millions of dollars in unwarranted benefits,[4] and require corrective action from a Congress that has never, despite repeated attention to the relevant statutory provisions, expressed disagreement with the Secretary's interpretation.

* * * * *

For the foregoing reasons and those previously stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MARCH 1994

[4] Respondent notes (Br. in Opp. 30 n.12) that the cost estimate contained in the petition (at 19) seems conservative in comparison to others previously provided to Congress. The $1 billion figure included in the petition is based on a conservative reading of the court of appeals' holding in this case. We believe that reading to be the correct one. If, however, the decision were to be read more expansively by later cases, the cost of implementing it would obviously be higher.

APPENDIX

Department of Veterans Affairs
Office of the General Counsel
Digested Opinion

March 8, 1994

HELD: No bar exists to consideration of a claim based on 38 U.S.C. § 351 arising from alleged injury to a veteran in a military hospital under VA auspices, even though there is no showing of fault on the part of VA employees.

Request for opinion concerning a section 351 claim based on military-hospital surgical treatment

1. You requested our opinion as to whether hospitalization or medical or surgical treatment furnished under VA auspices to a VA beneficiary in a military hospital lays the predicate for a claim under section 351 of title 38, United States Code. That section authorizes compensation to any veteran disabled by reason of an injury or aggravation of an injury suffered 'as a result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Veterans Administration . . . and not the result of the veteran's own willful misconduct . . .' For reasons set forth below, our answer is in the affirmative.

2. In this case the veteran, whose service connected disabilities were rated non-compensable, was awarded [a] VA pension effective January 6, 1981. A resident of El Paso, Texas in 1980-81, he was admitted to the William Beaumont Army Medical Center in El Paso on January 12, 1981, and surgery was performed on January 26 for a nonservice connected condition.

Through an ongoing agreement with the Department of Defense that applies to many military hospitals besides Beaumont, VA leases a number of beds in the Beaumont facility and in this way secures needed care for eligible veterans. The veteran's records do not document authorization for his admission, but, according to the Army Medical Center, VA paid for his care. The veteran now claims compensation benefits under section 351, alleging the surgery resulted in additional disability. The merits of this allegation are not at issue in this opinion, which conerns only whether injury resulting from treatment at such a facility can give rise to eligibility under section 351.

3. Neither section 351 itself nor its implementing regulation, section 3.358 of title 38, Code of Federal Regulations, which governs determinations of disability for section 351 purposes, excludes section 351 eligibility based on VA-authorized military hospitalization. However, subsection (c)(3) of that section rules out compensation for events occurring during hospitalization in the absence of a showing of 'indicated fault on the part of the Veterans Administration.' Events occurring in a military hospital and giving rise to a section 351 claim ordinarily would not involve 'indicated fault' by VA employees. In this case, for example, the veteran does not allege misfeasance by VA employees.

4. In our view, the interpretation in 38 C.F.R. § 3.358(c)([3]) is overly restrictive. It must be remembered that section 616 of title 38 specifically authorizes the VA to reimburse other Federal agencies, including the military, for care provided to veterans. We observe that Congress recently expanded VA's capacity to utilize military-hospital facilities for veterans' care; see, *e.g.*, 38 U.S.C. §§ 5011 and 5023.

We suggest, therefore, that the requirement of 'indicated fault on the part of the Veterans Administration' should not apply if the claim is founded on allegations of injury during VA-authorized military hospitalization.

5. The congressional debates at the time section 351's predecessor statute was reenacted following the Economy Act, Pub. L. No. 73-2 (1933), dwell on the Federal Government's responsibility to compensate veterans treated under VA auspices for Government malpractice. The debates do not evince an intent to preclude consideration of claims based on VA-authorized care in a military hospital, 78 Cong. Rec. 3289-3290 (1934). Interestingly, two of the very first cases occasioning interpretation of section 351's predecessor statute involved hospitals not under the direct jurisdiction of the Veterans Bureau or the Veterans Administration. In a Comptroller General decision dated June 18, 1930 (A-31895, 9 Comp. Gen. 515), the veteran had been hospitalized during the later 1920's in the Pacific Branch of the National Home for Disabled Volunteer Soldiers. The National Homes were administratively separate from the Veterans Bureau and not consoldiated until the VA's inception in 1930. See, *e.g.*, Medical Care of Veterans 61-76 (Veterans Administration, 1967). The Comptroller General was of the view that Congress intended coverage for the 'acts of any person charged with duty respecting [veterans'] care,' and 'all classes of Governmental hospitalization.' In the other case, dealt with in Administrator's Decision No. 255, August 9, 1934, the veteran had been hospitalized in the Norfolk Naval Hospital. (That decision, which determined the veteran ineligible because the claim was not founded on malpractice, would appear to have

been superseded by Op. G.C. 2-78 under which an accident may be the basis for a section 351 claim.)

6. Over the years, Congress has amended section 351 and its predecessors but has not sought to challenge VA's interpretation by amendment or otherwise. It may, therefore, be urged that Congress has impliedly approved the requirement of VA error or fault in the current regulation. Although we would not rule out resort to this 'rule of statutory construction' in a proper case, we do not consider it applicable here because we doubt a court would agree. *Kirkhuff* v. *Nimmo*, 683 F.2d 544 (D.C. Cir. 1982), is an excellent guide to obtaining judicial deference to our interpretations. In that case, plaintiff sought to overturn VA's rule making veterans with routine pregnancy ineligible for nonservice-connected health care. In support of its deference to the VA's interpretation, the court cited contemporaneous (1924) legislative history, VA's wide-ranging discretion in veterans' benefits matters, and VA's longstanding and consistent adherence to its rule, *id.* at 552.

7. We do not believe a court would accord a similar deference to the interpretation in question here. In *Kirkhuff*, the statutes (38 U.S.C. §§ 610(a)(1)(B) and 601(1)) were arguably inconsistent, necessitating resort to rules of statutory construction. That is not the case here where the interpretation is a gloss on a statute that on its face does not require VA fault. Also, in *Kirkhuff*, there was an unambiguous history of administrative consistency, which cannot be said of the VA decisions involving section 351 and its predecessors. We believe a court would, in the absence of affirmative congressional consent, be extremely reluctant to defer to VA's foreclosure of liability in this case.

8. We conclude, therefore, that no bar exists to the consideration of this veteran's section 351 claim, but caution once again that the claim's merits remain to be determined by the adjudicating authority. As is made clear in 38 C.F.R. § 3.358 and Op. G.C. 2-78, section 351 compensation is not insurance against all disability that follows hospitalization or medical or surgical treatment under VA auspices. Rather, this is a special benefit afforded to those suffering from untoward consequences of the hospitalization or treatment. We observe also that section 351 requires offset of funds received by reason of a Federal Tort Claims Act action, an offset that applies whether the FTCA action is against the military or against the VA. In the case of pension veterans awarded section 351 compensation, moreover, section 523 of title 38 applies so that the veteran may receive only the greater benefit.